Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 05-271
Consumer Protection in the Broadband Era	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

National Association of State Utility Consumer Advocates
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone: (301) 589-6313

Kathleen F. O'Reilly
Attorney at Law and Counsel to NASUCA
414 "A" Street, Southeast
Washington, D.C. 20003
Phone: (202) 543-5068

David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications Committee
Karen Hardie, Principal Regulatory Analyst Office
Ohio Consumers' Counsel
10 West Broad St., Suite 1800
Columbus, Ohio 43215
Phone: (614) 466-8574

Philip F. McClelland
Senior Assistant Consumer Advocate
Joel H. Cheskis
Assistant Consumer Advocate
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101
Phone: (717) 783-5048

Christine A. Mailloux
Telecommunications Attorney
The Utility Reform Network
711 Van Ness Avenue, Suite 350
San Francisco, CA 94102
Phone: (415) 929-8876, ext 353

John R. Perkins, Consumer Advocate
Craig F. Graziano
Office of Consumer Advocate
Iowa Department of Justice
310 Maple Street
Des Moines, IA 50319-0063
Phone: (515) 281-5984

January 17, 2006

TABLE OF CONTENTS

I. INTRODUCTION

On September 23, 2005, the Federal Communications Commission ("Commission" or "FCC") released a Report and Order and Notice of Proposed Rulemaking ("NPRM") in multiple dockets, including this one. The Report and Order portion of the document, *inter alia,* established a new regulatory framework for broadband Internet access services offered by wireline facilities-based providers.[1] The NPRM portion of the document seeks comment on "the need for any non-economic regulatory requirements necessary to ensure that consumer protection needs are met by all providers of broadband Internet access service, regardless of the underlying technology."[2] The Commission identifies several areas in which it seeks comments on whether the imposition of non-economic requirements is desirable and necessary as a matter of public policy, or whether the Commission should rely on market forces to address some or all of the areas listed.[3]

The NPRM states that consumer protection is a priority for the Commission and recognizes the Commission's duty to ensure that the consumer protection objectives in the federal Telecommunications Act of 1996 are met.[4] The NPRM emphasizes that the Commission will not hesitate to adopt any non-economic regulations that are necessary to ensure consumer protection in the broadband era and promises swift and vigorous enforcement action when

---

[1] NPRM at ¶ 1.

[2] Id. at ¶ 4, 146-159.

[3] Id. at ¶ 147.

[4] Id. at ¶ 146; *citing*, 47 U.S.C. § 151, *et seq*. ("the Act").

necessary.[5] The National Association of State Utility Consumer Advocates ("NASUCA") applauds such commitments.[6]

II. SUMMARY

NASUCA submits that many of the consumer protections in place in Title II should be required of all broadband service providers and vigorously enforced in the exercise of the Commission's ancillary jurisdiction in Title I of the Act. In particular, the Commission should:

- Require non-discrimination standards for broadband network so that broadband networks remain open and continue to offer great public and economic benefit to consumers;

- Require all providers of broadband services to provide universal service funding;

- Ensure that consumers have a reasonable expectation of privacy when using the broadband network and the services provided over the broadband network;

- Take proactive steps to prevent cramming, fraud and other abuses;

- Ensure that consumers have reliable access to the broadband network by requiring network outage reporting;

- Encourage the cooperation and commitment of both federal and state resources to ensure consumer protections in the broadband era; and

---

[5] Id. at ¶¶ 111, 145.

[6] NASUCA is a voluntary association of 45 advocate offices in 42 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g., Ohio. Rev. Code* Ch. 4911; 71 *Pa. Cons. Stat. Ann*. § 309-4(a); *Md. Pub. Util. Code Ann*. § 2-205; *Minn. Stat*. § 8.33; *D.C. Code Ann*. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers, but are not created by state law or do not have statewide authority.

- Ensure that consumers are able to file complaints against their broadband service providers and track such complaints in a consolidated manner.

These actions are vital consumer protections in the broadband era and should be established as part of this proceeding.

The Commission should reject the anticipated arguments from broadband service providers to let "the market" provide consumer protections. All too often "the market" has failed to provide essential consumer protections. The Commission should not now assume that marketplace-generated consumer protections have kept pace with the proliferation of the broadband network despite the numerous services and benefits its carries.

III. COMMENTS

A. Introduction.

The NPRM demonstrates the continuing conundrum of the interplay between broadband services and traditional voice services. NASUCA has previously written extensively on various issues related to broadband services in response to the Commission's Notice of Proposed Rulemaking In the Matter of IP-Enabled Services[7] and incorporates those Comments. Many of those issues are relevant to the instant NPRM.

Historically, consumer protections have not been imposed on services when first made available as the result of newly developed technologies because they were typically seen as a "luxury" rather than "basic" communication features. Once penetration levels reached significant levels, however, consumer protections were extended to encompass these now non-luxury technologies. Thus, as party lines were replaced with private lines, and "basic" dial tone

[7] In the Matter of IP-Enabled Services, WC Docket No. 04-36, Comments of the National Association of State Utility Consumer Advocates (dated May 28, 2004).

was routinely "enhanced" by features such as Call Waiting, regulation kept pace by providing consumers of those features with appropriate consumer protections.

Ultimately, as voice traffic over broadband networks for day-to-day activities, work-related tasks and "mission-critical" applications continues to increase, consumer protections available to landline consumers should be extended to customers of ***all*** broadband service providers. That comprehensive approach is important particularly because broadband is increasingly a necessary service for many customers, not a luxury item used solely for games and shopping. With broadband service, consumers reasonably expect protections that reflect what is at stake in broadband transmissions; protections relating to data, not merely voice.

While the Commission now seeks to exercise its authority under Title I to require consumer protections in the broadband era generally, the Commission must recognize at the same time that many voice services are being provided via broadband. Therefore, for example, when the Commission seeks comments on network outage reporting requirements, *infra*, the Commission is seeking comments on the need for network outage reporting that may arise when a broadband connection is dropped causing interruption to data ***and*** voice services. Such an interruption would interfere with sending large files over the internet and, at the same time, would interrupt voice service provided over a broadband connection through a Voice over Internet Protocol ("VoIP") provider. Likewise, when the Commission seeks comments on truth-in-billing issues, it must consider such issues that may arise for traditional voice services provided over the broadband network as well as issues that may arise for the provision of the underlying broadband service itself.

This dichotomy becomes particularly significant given the continuing technological evolution through which more and more voice calls are being carried. The traditional copper-

wire public switched telephone network ("PSTN") is increasingly being converted to fiber-optic loops connected via packet-switched networks that rely on Internet Protocol and the use of broadband. The vast majority of consumers neither understand nor care which type of "switch" is used, and such distinction should have virtually no bearing on whether a consumer is entitled to consumer protections. As more traditional voice traffic is being carried over these new networks, the implications for consumer protections in the broadband era become even greater.

Where an incumbent local exchange carrier ("ILEC") changes its network to VoIP technology over the broadband network, doing so may eliminate or effectively reduce numerous consumer protections previously afforded ILEC's customers' voice traffic carried over the traditional PSTN. Regulation based on the underlying technology over which a voice call is carried may inadvertently result in the loss of numerous consumer protections. Broadband service providers should not be able to avoid providing vital consumer protections merely because of a changed network protocol over which they transport voice traffic.

With that in mind, NASUCA notes the NPRM sets as one of its goals to "ensure that consumer protection needs are met by ***all*** providers of broadband Internet access service, regardless of the underlying technology."[8] As a result, NASUCA submits these Comments to advocate for consumer protections that will be applied to digital subscriber line ("DSL") broadband providers, such as Verizon; cable modem broadband providers, such as Comcast; wireless broadband providers, such as Boingo; satellite broadband providers, such as DirectWay; and other broadband providers that offer broadband service over any other technology. Consumer protections should not depend on subscribing to "telecommunications-like" services.

---

[8] NPRM at ¶ 146 (emphasis in original). *See also*, NPRM ¶ 146, n. 442 ("we note that questions regarding regulatory obligations of cable modem providers have previously been raised in the Cable Modem Declaratory Ruling and NPRM. The extent that our inquiry here is duplicative of those questions, we ask commenters to refresh the record by filing comments in this instant proceeding in WC Docket No. 05-271.").

Customers should be afforded the protections adopted by the Commission regardless of whether the provider is offering telecommunications-like services or whether the customer actually subscribes to those services.

NASUCA also notes the applicability of the NPRM to both broadband service providers who are facilities-based (*i.e.,* owners of the actual broadband network such as Verizon, Comcast, etc.) and broadband service providers who provide services using the broadband networks of others to provide "telecommunications-like" services (*i.e.*, Vonage, Skype, etc.). In these Comments, NASUCA urges the Commission to find that the consumer protection issues discussed below apply to both the facilities-based owners of the broadband network and those companies that use the broadband network to provide "telecommunications-like" services.

The Commission's exercise of jurisdiction over broadband service providers through Title I of the Act is not unprecedented. In particular, the FCC has recently explicitly exercised Title I jurisdiction over VoIP providers for E911 service.[9] This action demonstrates, in part, the extent to which the FCC has authority over certain providers of various services pursuant to Title I. NASUCA recognizes this authority and advocates the use of the Commission's Title I jurisdiction in this proceeding regarding the issues discussed below.

The Commission should not accept at face value claims that the application of consumer protections represents a burden on broadband service providers that outweighs these fundamental protections for consumers. Nor should the Commission assume these consumer protections are an impediment to the Commission's obligations under Section 706 of the Act to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all

---

[9] In the Matters of IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking, WC Docket . Nos. 04-36 and 05-196 (rel. June 3, 2005) at ¶ 26.

Americans."[10] In fact, it is precisely these consumer protections that would enhance consumer confidence in the new technologies, and fuel demand for access to the broadband network because consumers are better able to use the services provided over that network. As a result, the Commission should ensure the consumer protections discussed below to promote the public interest.

B. The Commission Should Ensure Certain Additional Consumer Protections In The Broadband Era Beyond Those That Are Articulated In The *Notice Of Proposed Rulemaking*.

1. Introduction.

The Commission has specifically delineated several areas where it seeks comments regarding whether consumer protections may be required for all broadband service providers.[11] NASUCA will address its position on these protections below. The Commission also inquired whether there are other areas of consumer protection that are not specifically delineated in the NPRM for which the Commission should impose regulations.[12] The Commission asks commenters to describe the nature of such consumer protections.[13] NASUCA submits that there are additional consumer protections which the Commission should ensure in the broadband era. These include requiring open access on the broadband network and ensuring that broadband service providers contribute to existing universal service funding mechanisms.

---

[10] 47 U.S.C. § 706(a).

[11] NPRM at ¶¶ 148-159.

[12] Id. at ¶ 147.

[13] Id.

2. Requiring Non-Discriminatory Standards Over The Broadband Network So That Broadband Networks Remain Open And Continue To Offer Great Public And Economic Benefit Is An Essential Consumer Protection In The Broadband Era.

Open access to the Internet, also referred to as network neutrality, is an essential consumer protection. The Commission must ensure that broadband service providers do not restrict consumer access to the Internet or discourage the development of competitive services provided over broadband services. As discussed further below, NASUCA supports open access in its broadest sense to allow consumers to choose content, applications, competitors and devices with equal service quality.

Open access is particularly important as some providers of broadband service seek to restrict such access to their network, or to create a "two-tiered" Internet.[14] In these cases, network owners will seek to have their own broadband content or services transmitted faster and more efficiently than those of their competitors. For example, the Financial Times has recently noted that "phone companies such as BellSouth and Verizon say it is expensive to build networks, such as Verizon's new fiber-optic connection to homes and offices, and they need to recoup their investment" as reasons for creating the "two-tiered network."[15] As a result, Financial Times has recommended "the FCC, and other communications regulators, should ensure that utilities do not distort internet services for their own ends."[16]

Qwest has recently announced a restrictive new "agreement" for its DSL customers which prohibits, for example, "the use of a DSL line by a business to provide a wireless hotspot

---

[14] *See*, Bray, Hiawatha, "Telecoms want their products to travel on a faster Internet," The Boston Globe, December 13, 2005.

[15] "Internet, Interrupted," Financial Times, January 11, 2006. *See also*, Stross, Randall, "Hey, Baby Bells: Information Still Wants to Be Free," New York Times, January 15, 2006 ("It gets worse. Now these same carriers – led by Verizon Communications and BellSouth – want to create entirely new categories of fees that risk destroying the anyone-can-publish culture of the Internet.").

[16] Id.

for its customers. It also prohibits all users from setting up any sort of server at all."[17] The CEO of AT&T (formerly SBC), Edward Whitacre, in reference to broadband content providers, recently proclaimed:

> They don't have any fiber out there. They don't have any wires. They don't have anything. They use my lines for free – that's bull. For a Google or a Yahoo! or a Vonage or anybody to expect to use these pipes for free is nuts![18]

Such discrimination against network content or services is not sound public policy and will inhibit the numerous innovations and consumer benefits associated with broadband networks. Open access on broadband networks is increasingly important, as broadband becomes the medium by which more services will be transmitted and as network owners and content owners are increasingly becoming the same through mergers.

The Commission should require non-discriminatory standards so that the broadband networks can remain open and continue to offer great public and economic benefits.[19] NASUCA applauds the Commission's recent Policy Statement that adopts four principles encouraging broadband deployment, and preserving and promoting the open and interconnected nature of the public Internet. According to the Policy Statement, consumers are entitled:

1. to access the lawful Internet content of their choice;

2. to run applications and use services of their choice;

---

[17] "Qwest's Quest to Limit Users' Use of the Internet." *See*, http://www.saschameinrath.com/node/279/.

[18] *See,* "Rewired and Ready For Combat," Business Week, November 7, 2005; *see also*, "Phone Companies Focus on High-Speed 'Net Connections," USA Today, December 25, 2005 ("there seems to be a mentality that they can put more and more through our pipes for free. We're the ones who built the network. You cannot make that sort of investment if you can't make a return on the capital. They're more than welcome use our networks, but if they do, they're going to have to pay. It's not free.").

[19] At paragraph 96 of the Report and Order, the Commission concluded that there was insufficient evidence to address the issues of discrimination and interference by facilities-based wireline broadband providers in this Report and Order but invited parties to provide further evidence to bolster the record. In these Comments, NASUCA urges the Commission to adopt nondiscrimination rules for broadband access providers. As shown above, this rapidly developing market has already provided signals that discriminatory practices will occur. Such practices are so detrimental to a healthy and effective consumer marketplace that the Commission must act to prevent harm.

3. to connect their choice of legal devices that do not harm the network; and

4. to competition among network providers, application and service providers, and content providers.[20]

These four principles are similar to the four "Net Freedom" principles that former Chairman Michael Powell believed should be ensured over broadband networks:

1. **Freedom to Access Content**. Consumers should have access to their choice of legal content.

2. **Freedom to Use Applications**. Consumers should be able to run applications of their choice.

3. **Freedom to Attach Personal Devices**. Consumers should be permitted to attach devices they choose to the connection in their homes.

4. **Freedom to Obtain Service Plan Information**. Consumers should receive meaningful information regarding their service plans.[21]

NASUCA supports the Commission's Policy Statement and the four freedoms promoted by Chairman Powell. However, these principles must be more than mere "policies."[22] Instead, they must be specific requirements placed on the broadband service providers, requirements both enforceable and enforced. Applying these policy requirements on broadband service providers is

---

[20] In the Matters of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket No. 02-33, Policy Statement (rel. Sept. 23, 2005)("Broadband Policy Statement").

[21] *See*, "Powell Urges Industry To Adopt 'Net Freedom' Principles," Federal Communications Commission Press Release, dated February 9, 2004; *quoting*, Remarks of Chairman Powell at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," University of Colorado School of Law, Boulder, Colorado (Feb. 8, 2004)("preserving 'Net Freedom' also will serve as an important 'insurance policy' against the potential abusive market power by vertically-integrated broadband providers"). *See also*, Remarks of Chairman Powell at the National Association of Regulatory Commissioners General Assembly, Washington, D.C., March 10, 2004.

[22] These principles represent a minimum of the necessary consumer protections in the broadband era. Consumers should also be entitled to other protections such as minimum pre-purchase disclosures, protections against unconscionable contract terms and conditions, reasonable measures to prevent service disruptions, reasonable process for consumer redress, to name a few. Some of these additional issues are addressed in the remainder of these Comments.

an essential consumer protection. Such protections will continue to allow consumers unfettered access to a multitude of Internet service providers and the wealth of information that such access brings.

The Commission has referred to providing telephone service on non-discriminatory terms and conditions as Open Network Architecture ("ONA") where "the telephone companies are obliged to provide a certain class of service to their own internal value-added divisions and the same class of service to a nonaffiliated (*i.e.*, outside) value-added company."[23] ONA requires that the phone company's architecture be "open" and that everyone and anyone can gain access to it on equal footing.[24] An open network is one that is capable of carrying information service of all kinds from suppliers of all kinds to customers of all kinds, across network service providers of all kinds, in a seamless and accessible fashion.[25] NASUCA believes that such an approach should be applied to broadband service providers as a fundamental consumer protection in the broadband era.

The FCC has long recognized the benefits of allowing end users to have the ability to access the public network via alternative applications or equipment as long as those alternatives do not have a detrimental effect on the network. This approach was recognized in the historic Hush-a-phone[26] and Carterfone[27] cases. In Hush-a-phone, AT&T claimed that the Hush-a-phone device violated its tariff that prohibited certain attachments. The Commission agreed with the makers of the Hush-a-phone that, if the use of a Hush-a-phone did not impair telephone service,

---

[23] Newton's Telecom Dictionary, 20th Edition, at 598.

[24] Id.

[25] National Research Council, "Realizing the Information Future," (1994) at 43.

[26] Hush-a-phone Corporation v. F.C.C., 238 F.2d 266 (D.C. Cir. 1956) ("Hush-a-phone").

[27] In the Matter of Use of the Carterfone Device in Message Toll Telephone Service; 13 FCC 2d 420 (1968) reconsideration denied, 14 FCC 2d 571 (1969) ("Carterfone").

a tariff provision barring use of the device would not be just and reasonable under the meaning of the Communications Act.

On appeal, the United States Court of Appeals for the District of Columbia held AT&T's tariffs, under the Commission's decision, were an unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental.[28] The Court required the FCC to apply a policy of nondiscrimination to benefit consumers.

In the Carterfone case, the FCC held that the Carterfone "fills a need and that it does not adversely affect the telephone system" and that "application of the tariff to bar the Carterfone in the future would be unreasonable and unduly discriminatory."[29] The FCC added:

> our conclusion here is that a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operations or the telephone system's utility for others. A tariff which prevents this is unreasonable.[30]

The FCC noted that the principle of Hush-a-phone was directly applicable.

The Hush-a-phone and Carterfone cases represent long-standing precedent that recognizes the value to consumers in being able to attach equipment of their choice to the network to their benefit.[31] These network neutrality requirements are equally applicable today to the provision of broadband services. Commissioner Michael Copps has stated:

> More than thirty-five years ago, the Commission decided to let consumers attach devices like the Carterfone to the end of the

---

[28] Hush-a-phone at 269 (emphasis added), *citing*, 47 U.S.C. § 205(a).

[29] Carterfone at 423.

[30] Id. at 424 (emphasis added).

[31] For additional discussion of the Carterfone and Hush-a-phone cases, please see NASUCA Comments at In the Matter of Petition of Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect To Their Broadband Services, WC Docket No. 04-440 (dated Feb. 8, 2005).

> network. And you know what? The doomsday loss of quality and control didn't come to pass. Instead, a right to attachment came into being. It brought consumers the basic freedom to attach any device to the network as long as it causes no network harm. And look at its benefits – fax machines and computer modems are direct descendants of this principle.[32]

Commissioner Copps' comments about these historic cases articulate the benefits reaped today resulting from the FCC's decisions nearly half a century ago to require network neutrality and non-discriminatory access to the network.

The Computer II proceeding exemplifies the FCC's efforts in creating network neutrality among these lines of cases. In Computer II, the FCC stated that the "essential thrust" of that proceeding was to "provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers."[33] In reaching its decision, the FCC also found that the "importance of control of local facilities, as well as their location and number, cannot be overstated. As we evolve into more of an information society, the access/bottleneck nature of the telephone local loop will take on greater significance."[34] The Commission must recognize in this proceeding how these same principles of open access and net neutrality remain a valuable consumer protection in the broadband era.

Commissioner Copps has recognized the value of allowing non-discriminatory access to the existing broadband infrastructure and the many consumer benefits such network neutrality

---

[32] Michael J. Copps, Opening Comments of Michael J. Copps, (posted June 23, 2004), Compiled as a part of Open Architecture as Communications Policy at 6 < http://cyberlaw.stanford.edu/blogs/cooper/archives/002272.shtml#comments>.

[33] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384, 475 (1980) ("Computer II") at ¶ 231. The Commission has declined to impose any Computer Inquiry requirements on facilities-based carriers in the provision of wireline broadband Internet access service. NPRM at ¶ 41. NASUCA offers that much of the consumer protections afforded under the open access policies articulated in the Computer Inquiry proceedings remain vital protections for consumers in the broadband era.

[34] Id., 77 F.C.C.2d at 468, ¶ 219; *see also*, Earl W. Comstock and John W. Butler, "Access Denied: The FCC's Failure to Implement Open Access to Cable as Required by the Communications Act" (posted June 23, 2004), Compiled as a part of Open Architecture as Communications Policy at 284 < http://cyberlaw.stanford.edu/blogs/cooper/archives/002272.shtml#comments> at 290-91.

will bring. Commissioner Copps has also recognized the significance of applying the Commission's policy of openness and competition to today's technologies, such as the Internet:

> In its Computer Inquiries, another Commission said that common carriers which own transmission pipes used to access the Internet must offer those pipes on non-discriminatory terms to independent ISPs, among others. With these decisions we preserved competition in the information services market by ensuring that customers could reach independent providers.
>
> • • •
>
> Internet openness and freedom are threatened whenever someone holds a choke-point that they have a legal right to squeeze. That choke-point can be too much power over the infrastructure needed to access the internet. And it can also be the power to discriminate over what web sites people visit or what technologies they use. [35]

Commissioner Copps added that the Commission could play a positive role to "ensure that the networks are open for innovation"[36] and that the focus should be on maintaining and enhancing "openness and freedom on the Internet and to fight discrimination over ideas, content and technologies."[37]

The benefits of such non-discriminatory access that had their inception in the Hush-a-phone and Carterfone cases are even more important as consumer protections in this era of broadband access to the Internet. The Commission recognized that "the Internet has had a profound impact on American life."[38] Broadband networks have provided a competitive environment that has allowed innovation and consumer benefits to prosper. The Hush-a-phone and Carterfone cases established the essential regulatory requirement that consumers would receive the benefit of network neutrality. The fact that consumers have been able to access

---

[35] FCC Policies that Damaged Media Now Threatening Internet: Commissioner Copps ask in Speech "Is the Internet as we know it dying?," 2003 FCC LEXIS 5579, 12 (Lexis 2003).

[36] Id.

[37] Id. at 26.

[38] Broadband Policy Statement at ¶ 1.

content and services and use equipment of their choice has been essential to the development and economic benefit related to the Internet.

Open access on the broadband network becomes increasingly important as the network owners and the content owners merge. For example, owners of broadband networks, such as Time Warner, have merged with large Internet service providers, such as AOL. The fundamental benefits of broadband services are compromised without assurances that Time Warner will be required to allow subscribers to its cable modem service to access whichever Internet service provider they desire at the same quality and speed as they would be able to access AOL. One content or service provider should not be given preferential treatment over another content provider. If the owner of the broadband network can selectively choose which content, applications and devices can be used over its broadband network, innovation and a multitude of consumer benefits are then jeopardized.

Even so, it is not just the actual imposition of network discrimination, but even the ***potential*** for such discrimination that can have a direct effect upon continued innovation and the development of consumer benefits.[39] When bottleneck facilities are present, such as is the case with broadband service providers, innovation may be quashed. An innovator may be cautious about its efforts if it knows that a major company may be able to discourage the use of the innovation. It is essential that the FCC preserve such network neutrality so that the benefit of

---

[39] Timothy Wu and Lawrence Lessig, Ex Parte Submission in CS Docket No. 02-52, (posted June 23, 2004), Compiled as a part of Open Architecture as Communications Policy at 258 < http://cyberlaw.stanford.edu/blogs/cooper/archives/002272.shtml#comments> ("The potential for discrimination has an obvious effect upon innovation today, whether or not there is any actual discrimination now. The question an innovator, or venture capitalist, asks when deciding whether to develop some new Internet application is not just whether discrimination is occurring today, but whether restrictions might be imposed when the innovation is deployed. If the innovation is likely to excite an incentive to discrimination, and such discrimination could occur, then the mere potential imposes a burden on innovation today whether or not there is discrimination now. The possibility of discrimination in the future dampens the incentives to invest today."). *See*, NPRM at ¶ 96 (declining to take steps to stop discrimination because of a perceived absence of problems). NASUCA believes waiting for problems to occur will *ensure* significant consumer harm and is bad public policy.

innovation over broadband networks may continue. Although at one time the innovations were a cup-like device that snapped on to a telephone instrument, today's innovations include telephone service provided over broadband networks that provides consumers with unlimited calling with a multitude of features at reduced costs.[40]

The great benefit the Internet has created is dependent upon its open nature. Never has this been more true than in the broadband era where new services and enhanced applications have an increasing impact on consumers' lives. The Internet has been designed as a neutral network where consumers may download content, run applications, and attach equipment easily and with little restriction. Because consumers are able to quickly and easily accomplish these functions, its benefits have multiplied and become a central factor in American life.[41] It is the assurance of network neutrality that has spawned growth and innovation and promises further benefits.[42] With faster broadband services, even greater innovations will become possible. However, if broadband service providers are not required to maintain a neutral network, such innovative developments may not come about. Network neutrality requirements must be applicable in the broadband era as a vital consumer protection so that the benefits of the Internet and the many applications that use broadband access can continue to thrive.

As the Internet increasingly carries voice grade telephony and other broadband services essential for consumers' day-to-day activities, open access will become even more important.

---

[40] NASUCA references its Comments and Reply Comments filed at Docket No. WC 04-36 on May 28, 2004 and July 14, 2004, respectively, for more information on NASUCA's position regarding VoIP services.

[41] Vinton Cerf and Robert Kahn, "What Is The Internet (and What Makes It Work)?" (posted June 23, 2004), compiled as a part of Open Architecture as Communications Policy at 39 < http://cyberlaw.stanford.edu/blogs/cooper/archives/002272.shtml#comments> ("the essential architecture of the Internet is based upon an end-to-end design by which the intelligence of the network lies at its ends. The Internet is open and transparent where data can transit the network without discrimination or restriction").

[42] Mark Lemley and Lawrence Lessig, "The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era," (posted June 23, 2004), compiled as a part of Open Architecture as Communications Policy at 46 < http://cyberlaw.stanford.edu/blogs/cooper/archives/002272.shtml#comments>.

To the extent that the growing level of VoIP services, for example, are carried over broadband networks, allowing broadband providers to discriminate and restrict broadband services will further restrict the extent to which these services will provide adequate voice grade telephony.

The FCC's long-standing policy emanating from the legacy of the Carterfone, Hush-a-phone, Computer Inquiry and Open Network Architecture cases recognizes the value to consumers in requiring network neutrality over broadband networks. This legacy has remained a cornerstone of FCC policy for nearly half a century and must once more be upheld, not chipped away. The FCC should recognize the importance of such a policy as an essential consumer protection in the broadband era.

3. Universal Service Funding Obligations Should Be Required Of All Providers Of Broadband Service.

In furtherance of its public interest mandate and as part of its statutory obligation to promote and advance universal service, the FCC should recognize that broadband service providers offering voice services and other telecommunications-like services have an obligation to contribute to universal service and specifically to the federal universal service fund. The FCC should not waver in its support of universal service and should require these service providers to contribute to universal service.

In the NPRM, the FCC has recognized its statutory obligations for universal service, noting its obligations under Section 254(d) pertaining to telecommunications carrier contribution.[43] The Commission also notes that the question of whether "other facilities-based providers of broadband Internet access services may, as a legal matter, or should as a policy matter, be required to contribute" is currently pending before it.[44] The Commission ultimately

[43] NPRM at ¶ 112, *citing*, 47 U.S.C. § 254(d).

[44] Id.; *citing*, Wireline Broadband NPRM at ¶ 79.

concludes that wireline broadband service providers must continue to contribute to existing universal service support mechanisms for a 270-day period, or until new contribution rules are adopted in the Universal Service Contribution Methodology proceeding.[45] NASUCA recognizes that proceeding is still pending. However, the Commission must go farther in *this* proceeding to ensure a viable universal service fund by requiring all platforms providing broadband service and offering telecommunications-like services to contribute to universal service as a vital consumer protection in the broadband era.

As the Commission notes, Section 254(d) allows the Commission to require "[a]ny other provider of interstate telecommunications to contribute to universal service if required by the public interest."[46] The Commission has specifically found that the transmission component of wireline broadband Internet access service to end users is "telecommunications."[47] Therefore, the Commission has the authority to assess these services for the universal service fund.

This commitment to universal service requires the FCC to have broadband service providers support universal service. Broadband service providers' obligations to support universal service pursuant to Section 254(b) are not eliminated simply because the FCC classified broadband service providers as an information service. The FCC's obligation as directed by Congress should compel the FCC in this proceeding to require broadband service providers to contribute to universal service. A vital consumer protection is that broadband service providers bear a universal service obligation.[48]

---

[45] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002).

[46] NPRM at ¶ 112.

[47] Id. at ¶ 104.

[48] Regarding assessing contribution on telecommunications that are bundled with other services, the FCC has already established adequate and workable mechanisms to address bundled service offerings in the CPE/Enhanced

The FCC should require broadband service providers to contribute to universal service support because it is in the public interest for those providers to contribute to the preservation and advancement of universal service. Similarly, the FCC has determined that it is in the public interest for certain non-common carriers of interstate telecommunications to contribute to universal service.[49] In the 1997 First Report and Order, the FCC based its determination, in part, on the principle of competitive neutrality. The FCC reasoned that requiring non-common carriers to make universal service contributions was in the public interest because it would expand the base from which universal service funds are assessed and would reduce the contribution requirements of any particular class of telecommunications provider.[50] The FCC reasoned that universal service contributions were in the public interest because universal service contributions should not distort business decisions or discourage providers from offering common carrier services.[51] The FCC reasoned that those contributions were in the public interest because requiring contributions from those non-common carriers would lessen the possibility that carriers without contribution obligations would compete unfairly against common carriers with contribution obligations.[52]

In this proceeding, the FCC should employ the same reasoning it used in the First Report and Order and determine that all broadband service providers must contribute to universal service support. Doing so would be a vital consumer protection in the broadband era. It would be proper for the FCC, as it did in the First Report and Order, and consistent with the FCC's

---

Service Bundling Order. CPE/Enhanced Services Bundling Order, 16 FCC Rcd 7418, 7446 at ¶ 48 (providers could contribute based on the total revenue from the bundled offering).

[49] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9183, ¶ 795 (1997) ("First Report and Order").

[50] Id.

[51] Id.

[52] Id.

finding in the September 23, 2005 Report and Order, to require all platforms providing broadband service and telecommunications-like service to contribute to universal service support. In the First Report and Order, the FCC adopted an expansive reading of provider obligations regarding universal service and increased the base upon which the fund is assessed. In doing so, the FCC increased the value of the network to broadband service providers who operate upon it and to the public as whole. NASUCA encourages the Commission to apply that same approach here. The FCC should not limit the sources upon which universal service support may be assessed. If the FCC exempts all types of telecommunications services that use broadband from the obligation to contribute to universal service, then that burden will fall upon an ever-shrinking base.

Consumers who currently use broadband services for voice transmission do so at a typically reduced incremental cost from current traditional voice transmission services over the PSTN. These broadband calls do not currently support universal service[53] and consumers making these calls do not have most regulatory protections, as do traditional calls placed exclusively over the PSTN. If the use of these broadband Internet access services for voice transmission increases, and broadband service providers offering voice transmissions are not required to contribute to universal service, an even larger portion of universal service funding will likely disappear. This prospect applies equally to other new technologies. Thus the FCC must exercise foresight, recognize this potential path of evolution, and ensure such trends do not further jeopardize existing universal support systems. If not, an ever-shrinking population of non-broadband voice customers will unfairly be paying a larger share of universal service.

[53] Except, of course, for broadband calls made over DSL lines where the voice services provider pays a universal service surcharge to the underlying facility provider who then pays into the fund.

There are several reasons supporting requiring all platforms providing broadband service and telecommunications-like services to contribute to universal service. First, the size of the universal service fund is expanding. Second, the funding base of universal service is not expanding as rapidly as the fund. Therefore, if broadband services are excluded from the contribution base, universal service funding assessments will increase for non-broadband voice service contributors. Therefore, the FCC should revise universal service contribution rules with an eye towards the manner in which the majority of Americans will access the Internet in the foreseeable future.

Requiring all platforms providing broadband service and telecommunications-like services which rely to any extent on the PSTN to contribute to universal service is particularly important. The FCC should make that determination because it is not now clear what the future broadband network will look like. It is reasonably certain, however, that the PSTN will continue to play an important role in the future of the broadband network given the substantial increase in voice services being carried over the broadband network, and the continued use of the PSTN for last mile connectivity by voice services. Although NASUCA will not here attempt to resolve this issue of future technologies, the FCC should not draw a technological "bright line" cut-off for universal service funding in an era of sweeping technological change.

This Commission should require broadband service providers to contribute to universal service support because those providers have built their businesses upon the value subscribers place on high-speed access to content available through broadband services, including access to the PSTN. In the past, the FCC has determined that it is in the public interest for entities that derive value from access to the PSTN to contribute to the support of that network. Using that rationale in the First Report and Order, the FCC required providers of interstate

telecommunications to contribute to universal service.[54] In that instance, the FCC justified its conclusion by determining that those telecommunications providers: 1) built their businesses, in full or in part, on access to the public switched network; 2) competed with common carriers; and 3) were exempt from common carrier status solely as a result of the structure of their business operations.[55] The same reasoning applied to broadband service providers regardless of whether they access the PSTN.

Broadband services in the 21st Century are no different in this respect from the predecessor telecommunications services in the 20th Century. The value of broadband services increases exponentially as more and more persons obtain access to them. As the broadband network expands, and Internet access via the broadband network increases, the value of broadband service increases likewise. It is in the best interest of all platforms providing broadband access service and telecommunications-like services to support universal service thereby allowing more consumers to sign up for services and do business with vendors and application providers.

Finally, the Commission should consider universal service issues as they pertain to disabled consumers. In the Report and Order, the Commission has determined to exercise its Title I authority to give full effect to the accessibility policy embodied in Section 255 of the Act for wireline broadband providers.[56] NASUCA supports the Commission exercising its Title I authority to give full effect of Section 255, and other requirements that increase disabled consumers' access to broadband services, to ***all*** broadband Internet access service providers. This

---

[54] First Report and Order at ¶ 794-797.

[55] Id. at ¶ 796.

[56] NPRM at ¶ 121; *citing*, 47 U.S.C. § 255 (access by persons with disabilities).

is important because disabled consumers benefit from various services provided over the broadband network.

As such, the FCC should require broadband service providers to contribute to universal service for the good of not only the broadband network, but also for the multitude of applications provided over the broadband network.

C. It Is A Vital Consumer Protection To Ensure That Consumers Have A Reasonable Expectation Of Privacy When Using Services Provided Over The Broadband Network.

1. Introduction.

Consumers have a reasonable expectation of privacy and control over their personal information as it is gathered and used for communications-related services. The Commission recognized this reasonable expectation through the adoption of a substantial body of regulations designed to protect consumer privacy. NASUCA strongly agrees with the Commission's statement that "Consumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on telecommunications services."[57] Differences in the underlying technology and format of the communications service render the consumer's expectation of privacy no less reasonable. The Commission should use its Title I authority to ensure current privacy regulations remain in place for consumers of broadband Internet access services.

[57] Id. at ¶ 148.

2. Broadband Access Providers Collect Highly Sensitive Personally Identifiable Information.

Broadband access providers collect information about their customers that mirrors the Commission's definition of customer privacy network information ("CPNI"),[58] including name, address, telephone number (if the broadband access provider was also the entity offering voice services), payment information, and services ordered from that provider. In addition, broadband access providers can also use sophisticated tools and software to track a customer's Internet and email usage including the types and frequency of websites visited and the content of email messages.[59] Therefore, the need for non-economic requirements to protect consumer privacy is arguably even more necessary for a customer of a broadband access provider than traditional providers, due to the more extensive and highly sensitive information that the provider can gather.[60]

The potential for privacy abuse by a broadband access provider is not theoretical. While many broadband access providers have voluntary privacy policies, the one-sided contracts required to sign up for service often forces consumers to accept unilateral and unknown prospective changes to those policies.[61] Not only are these privacy policies full of loopholes and

---

[58] Sec. 222(h)(1); 47 C.F.R. §64.2003(d).

[59] Electronic Privacy Information Center, Privacy Self Regulation: A Decade of Disappointment, March 3, 2005, http://www.epic.org/reports/decadedisappoint.html (listing at least nine software tools currently used or on the horizon for tracking web usage).

[60] In previous comments, NASCUA noted that a provider using IP technology may be able to handle, analyze and disseminate information in new ways and more broadly than can now be achieved on the PSTN. *See*, NASUCA Opening Comments, NPRM on IP-Enabled Services May 28, 2004 at p. 56.

[61] *See e.g.*, the Terms of Service document for SBCYahoo! Subscribers at http://sbc.yahoo.com/terms/, which incorporates the privacy policy found on a different web page and then informs the member that the Terms of Service (presumably including the privacy policy) "may be updated or changed from time to time." *See,* Sections 1,6,15,29. *See also*, SBC Internet Service Privacy Policy Section 3 "SBCIS may amend this Privacy Policy from time to time. If we make any substantial changes in the way we use your personal information we will notify you by posting a prominent announcement on our pages. Please also check periodically for any changes to our Privacy Policy." *See also*, Time Warner Cable Residential Services Subscriber Agreement at http://help.twcable.com/html/twc_sub_agreement2.html. This agreement includes ISP services and states at Section

exceptions, they generally are unenforceable by a consumer.[62] Privacy abuses have already occurred, creating a record for the need to apply current privacy protections on broadband access providers.[63]

As the broadband access provider industry develops, it is reasonable to assume that consumers will have the same expectations regarding the privacy of personal information as they do today for their communications services. It is also reasonable to assume that abuses will occur, much like in other industries, and that there has been no evidence that would justify placing broadband access providers above traditional legal principles.

3. Application of Privacy Rules is Warranted.

Even without a concrete and substantial record of privacy abuses, extension of current privacy regulations to broadband access providers under the Commission's Title I authority is in the public interest, effectuates the goals of the current privacy rules, and is reasonably ancillary to the effective performance of the Commission's duties.[64] The Commission has acknowledged that consumers have an interest in "limiting unexpected and unwanted use and disclosure of their personal information by carriers."[65] On that basis, the Commission has adopted regulations on use and disclosure of personally identifiable information,[66] mandated call blocking options

---

1(b) that, "TWC has the right to add to, modify, or delete any term of this Agreement, the Terms of Use, the Subscriber Privacy Notice or any applicable Tariff(s) at any time."

[62] Annenberg Public Policy Center, *Americans & Online Privacy, the System is Broken*, June 2003 (demonstrates that Internet privacy policies are confusing and consumers do not understand the full extent to which a provider collects and uses personal information). There may be some instances where the Cable Communications Policy Act of 1984 gives customers enforceable rights with regards to certain provisions of a privacy policy offered by a cable operator.

[63] *See, e.g*, Press Release, *Thirty-one Privacy and Civil Liberties Organizations Urge Google to Suspend Gmail*, April 19 2004 http://www.privacyrights.org/ar/GmailLetter.htm (concerns over potential privacy abuses from scanned and compiled email texts); Olsen, Stephanie, Comcast Privacy Move its Latest Woe, CNET News (February 2002) http://news.com.com/2100-1023-836937.html (concerns over plans to store web-users data).

[64] NPRM at ¶ 97, n.287, and ¶ 110.

[65] CPNI Remand Order at ¶ 33.

[66] 47 C.F.R §64.2001-2009.

related to Caller ID,[67] limited the transfer of Billing Name and Address information by interconnecting carriers,[68] and restricted the use of Automatic Number Identification by toll free carriers for marketing purposes.[69] Consumers have come to understand and expect a general level of privacy protection for their personal information that should not depend on changes in format or underlying technology of the service. At a minimum, each of these provisions should be enforced against broadband access providers to the extent it is technically feasible.

In addition, the Commission should critically examine the technology, networks and software of the broadband access provider industry to determine if there are any additional safeguards that should be put in place to protect consumer privacy. For example, VoIP services can be mobile and therefore can provide location information of the user. The Commission should address this issue to prohibit the collection and disclosure of location information unless required to provision the service.[70]

The Commission has historically applied its privacy requirements with a broad brush to uphold consumer privacy rights regardless of the classification of the service. For example, current CPNI regulations limit the carriers' ability to disclose customer information for the purpose of marketing "communications related" services that include information services, Internet access, voice mail and customer premises equipment ("CPE") related services.[71] The NPRM also points to longer-standing privacy protections developed as part of the ONA and Computer Inquiry debates that applied to the incumbent local exchange carriers' provision of

---

[67] 47 C.F.R. §64.1601.

[68] 47 C.F.R. §64.1201.

[69] 47 C.F.R. §64.1602-1603.

[70] *See*, Letter from Marc Rotenberg, Electronic Privacy Information Center to Chairman Michael Powell, FCC dated December 15, 2003, urging the Commission to "address the privacy implications of VOIP services and to ensure the establishment of strong privacy safeguards for users of advanced network services."

[71] 47 C.F.R. §§64.2007(b), 64.2003(f).

enhanced services even though those services were generally not subject to Title II regulations.[72] It is important to note the Commission's enforcement of privacy rights pre-dates the Congressional mandate in Section 222 and the statute's narrow focus on telecommunications carriers. The Commission has a substantial record upon which to continue its tradition of protecting consumer privacy and applying those protections beyond the traditional common carrier.[73]

Specifically with regard to broadband access providers, the Commission has recognized that "consumers' privacy needs are no less important when consumers communicate over and use broadband Internet access than when they rely on telecommunications services."[74] In fact, as discussed above, it may be that the types of information gathered by broadband access providers warrant stricter limits on the use and disclosure of information due to the particularly sensitive nature of the information that can be collected and the potential for its unlimited dissemination if it is disclosed.

Government action to protect privacy regarding Internet usage and email traffic is not unwarranted. Congress has already acknowledged a privacy right in electronic communications.[75] Further, there is a rich body of academic and popular literature calling for strong privacy protections for on-line communications and activities. The legal and public policy

---

[72] NPRM at ¶ 149.

[73] Id. *See also*, 47 C.F.R. §64.1201 (limits on disclosure and use of Billing Name and Address and ANI usage). While these regulations were adopted in 1993, in part for purposes of prohibiting anti-competitive usage of incumbent customer data, the result has been to create an expectation of privacy by the consumer which should be upheld here under Title I.

[74] NPRM at ¶ 148.

[75] *See*, Electronic Communications Privacy Act, 18 U.S.C. §2701 (privacy of stored electronic communications); Children's Online Privacy Protection Act, 15 U.S.C. §6501 et seq. (control over personal information collected by websites directed at children).

underpinnings for extending privacy protections to broadband access providers should not be ignored.[76]

4. Claims that Competition and Self-Regulation Will Protect Consumers' Privacy Must Be Rejected.

In the Report and Order, the Commission relies on competition (at least the potential for competition) in the broadband Internet access market to provide consumers choices.[77] However, competition may not similarly be relied upon to protect consumers' privacy rights for several reasons. First, if consumers do not have a substantial and meaningful choice of broadband Internet access providers they cannot comparison shop based on the privacy policies and the information handling practices of competing providers.[78] Today, the vast majority of residential and small business consumers are limited to one or two providers that offer broadband service in their area. A monopoly, duopoly or cartel provides no incentive for those carriers to offer strong privacy protections and assurances.

Second, this Commission and Congress both realize that competition, even if it existed, does not necessarily respect, let alone ensure, consumers' privacy rights,

> Section 222 reflects Congress' view that as competition increases, it brings with it the potential that consumer privacy interests will not be adequately protected by the marketplace. Thus, section 222 requires *all* carriers, whether or not a market is competitive, to protect CPNI and embodies the principle that customers must be

---

[76] *See*, McPhie, David *Almost Private: Pen Registers, Packet Sniffers, and Privacy at the Margin,* 2005 Stan. Tech. L. Rev. 1; Rotenberg, Marc, *Fair Information Practices and the Architecture of Privacy*, 2001 Stan. Tech. L. Rev. 1; Solove, Daniel *The Digital Person, Technology and Privacy in the Information Age* (NYU Press, 2004); Solove, Daniel, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosures,* 53 Duke LJ 967 (2003); Reidenberg, Joel *Privacy Wrongs In Search of Remedies*, 54 Hastings L.J. 877 (2003).

[77] NPRM at ¶¶ 78-79.

[78] Id. at ¶¶ 54, 57-58, noting that 95.7% of DSL consumers receive service from their incumbent local exchange carriers and that there is really only the "threat of competition" from "emerging" alternative broadband platforms that have relatively few subscribers.

> able to control their personal information from unauthorized use, disclosure, and access by carriers.[79]

The Commission currently requires all telecommunications carriers, regardless of the underlying technology or presence of competition, to comply with the CPNI rules.[80] Broadband access providers should not be exempted from those rules.

Third, as discussed above, while some broadband access providers adopt privacy policies to attempt to assure consumers their personal information and usage history will be "safe," potential consumers can hardly rely on such policies to differentiate among providers. And when customers sign up for service, they must sign a contract of adhesion that, at a minimum, weakens their rights and allows prospective unilateral changes to those policies.

Fourth, a company's specific privacy practices are not transparent to the consumer, limiting consumers' ability to "vote with their feet" and find a different carrier with more acceptable policies. Most consumers only discover a misuse of personal information after-the-fact, upon receiving a random piece of junk mail, a telemarketing call, or an indication of fraud based on identify theft. Once personal information has been misappropriated or released, it is very difficult for the consumer to regain control of that information. Remedies for harm once perpetrated may not make a consumer whole. Therefore, proactive and preventative measures are necessary to forestall consumer harm.

Finally, it is important to note that many industries have attempted to prevent government oversight of privacy practices through "self-regulation." The direct marketing, financial and health care industries each created and heavily lobbied to avoid proactive regulation based on

---

[79] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409 (1999), ¶ 3 (emphasis in original).

[80] CPNI Third Report & Order at ¶ 141.

their own set of guidelines and best-practices for information handling. Eventually, however, federal and state regulators realized that, while they were worried about burdening the industry with unnecessary regulation, consumers were being harmed. Congress has recognized the need to prevent consumer harm in those industries.[81] The broadband access industry is no different. Cable, DSL, wireless and ISPs all have privacy guidelines and policies, but these voluntary efforts lack meaningful industry sanctions for noncompliance and should not be relied upon to protect consumers.[82] It is the *Commission's* duty to protect consumers and should not leave it to providers to police themselves.

Commissioner Adelstein stated it best when he said in response to the Report and Order,

> On some issues, like consumer privacy, it would have been far wiser to act now. I'm troubled by the prospect that we might even temporarily roll back consumer privacy obligations in the Broadband Reclassification Order, particularly during this age in which consumers' personal data is under greater attack than ever. The Commission must move immediately to address these privacy obligations.[83]

NASUCA supports the comments of Commissioner Adelstein and urges the Commission to act quickly and apply its various privacy rules to broadband Internet access providers pursuant to its Title I authority.

---

[81] Federal Trade Commission, Telemarketing Sales Rule, 16 C.F.R. Part 310 (Do Not Call List); Graham-Leach-Bliley Act, 15 U.S.C. §6801 *et seq.*(privacy of financial records); Health Insurance Portability and Accountability Act Public Law 104-191, implemented by 45 C.F.R. Part 160 *et seq*.

[82] *See, e.g.*, *Principles for Broadband and IP Services*, US Internet Industry Association, August 2005, http://www.usiia.org/pubs/principles.doc (self described as "core principles for the balance of business and consumer broadband interests through industry self-regulation"); *Rights and Responsibilities of VoIP Providers*, National Cable & Telecommunications Association, March 2005, http://www.ncta.com/pdf_files/IssueBriefs/2005/VoIP-regulation.pdf; Online Privacy Alliance, *Creating Consumer Confidence Online: Five Essential Elements to Online Privacy* , http://www.privacyalliance.org/resources/ppguidelines.shtml; Electronic Privacy Information Center, *Privacy Self Regulation: A Decade of Disappointment*, March 4, 2005, http://www.epic.org/reports/decadedisappoint.html.

[83] NPRM, Concurring Statement of Jonathan S. Adelstein.

D. The Commission Should Ensure That Providers Of Voice Services Over The Broadband Network Adhere To The Existing Slamming Regulations And That All Providers Of Broadband Services Maintain Appropriate Verifications.

With respect to those broadband services, such as VoIP services, that are the functional equivalent of traditional telephone service, slamming poses the same threat in the context of broadband services that it poses in the context of traditional telephone service. As voice traffic moves to broadband, voice customers on the broadband network need and deserve the same protection against slamming, the unauthorized change of their service provider, as that afforded to voice customers on the PSTN. The Commission's slamming regulations should accordingly be applied equally to providers of voice services on the broadband network.

Of course, slamming is an objectionable practice in any and all broadband contexts. It is clear that consumers expect and deserve protection from slamming. The Commission should make that principle explicit from the outset. It is not clear that the verification requirements set forth in the current rules would lend themselves to ready application outside of the context of voice. Nor is it clear precisely what verification requirements should be required in contexts other than voice. At a minimum, broadband providers should be required to maintain such verifications of customer orders as are appropriate under the particular circumstances. The Commission must develop refinements of the slamming rules to apply to broadband applications.

E. The Commission Should Take Proactive Steps To Prevent Cramming, Fraud And Abuse With Strong Specific Regulations.

The NPRM observes that the Commission's truth-in-billing rules are designed to reduce slamming, cramming and other telecommunications fraud by setting standards for accuracy on

bills.[84] In telecommunications, slamming and cramming violations, along with other forms of fraud and abuse, continue with troubling frequency. Many violations are the result of outright fraud on the part of the unscrupulous. The harm to consumers is no less, however, even if the root cause is inadequate employee training or other results of cut corners, sloppiness or negligence.

"Market forces" will not curtail or eliminate these violations. The prevention of fraud and abuse, and the consequent protection of consumers, properly rests with regulators and law enforcement personnel.[85] It is in the best interest of the industry, moreover, to support efforts to curtail and eliminate fraud and abuse. Otherwise, unscrupulous and negligent providers successfully deprive those who are law-abiding and careful of the benefits of their investments and labors.[86] The current truth-in-billing rules for telecommunications providers have not been successful in policing the market. As Commissioner Copps recently observed:

> In the six years since adoption of our truth-in-billing requirements, I cannot find a single Notice of Apparent Liability concerning the kind of misleading billing we are talking about today . . . . Yet in

---

[84] NPRM at ¶ 153. There, the Commission defines "cramming" as "the practice of placing unauthorized, misleading or deceptive charges on a telecommunications bill."

[85] As the FCC has noted in its current Truth in Billing proceeding

> [A]s competition evolves, the provision of clear and truthful bills is paramount to efficient operation of the marketplace. Although we agree that a robustly competitive marketplace provides the best incentive for carriers to meet the needs of their customers …we also recognize that some providers in a competitive market may engage in misconduct in ways that are not easily rectified through voluntary actions by the industry.

Truth in Billing, Second Report & Order, ¶ 17.

[86] Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Second Report and Order and Further Notice of Proposed Rulemaking, 14 F.C.C.R. 1508 ¶ 1 (1998)("Subscriber Carrier Select Order")(the FCC has properly observed that fraud and abuse, in that instance slamming, "distorts the telecommunications market because it rewards those companies who engage in deceptive and fraudulent practices by unfairly increasing their customer base at the expense of those companies that market in a fair and informative manner and do not use fraudulent practices.").

> the last year alone, the Commission received over 29,000 non-slamming consumer complaints about phone bills.[87]

As a result, fraud and abuse continue.[88]

There is no reason to conclude that broadband service is immune from similar fraud and abuse. Indeed, with a myriad of new products and services, and a likely chain of billing agents, the potential for fraud and abuse is every bit as substantial in broadband as it is in telecommunications, if not more so. Indeed, as the Commission observes, complaints have been received about the billing practices of broadband Internet access providers, including complaints related to double billing, billing for unexplained charges, and billing for cancelled services.[89]

NASUCA member states have already observed troubling patterns of practice in the broadband access industry that this Commission must address in any form of consumer protection rules it adopts. Contracts of adhesion are replete with small print exceptions to the marketing promises made about "unlimited usage" and "blazing fast speeds."[90] Contracts that allow for unilateral company-initiated changes to key terms and provisions are all too common and harmful to consumers.[91] Use of vague terms to justify restrictions on usage (such as restrictions on "bulk messages") and automatic extensions of contracts at possibly different and

---

[87] Truth-in-Billing and Billing Format, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed rulemaking, 20 F.C.C.R. 6448, 6499 (2005) ("Truth-in-Billing Second Report and Order")(separate statement of Commissioner Michael J. Copps).

[88] Id. Even recent efforts by the Commission to revise its current truth-in-billing rules do not go far enough to protect consumers in today's marketplace. The Commission's Second Further Notice of Proposed Rulemaking only proposes to address two discrete areas: treatment of government mandated charges and point of sale disclosure.

[89] NPRM at ¶ 153.

[90] *See, e.g.*, Terms of Service document for SBCYahoo! Section 3 which states, "There is, however, no guarantee or warranty that actual throughput from the Internet to your computer ("throughput speed") will be at or above the low end of the speed range." It also informs the consumer that throughput speeds may be limted at SBC's "sole discretion" and the only remedy is to cancel the contract.

[91] SBCYahoo! Terms of Service at Sections 1, 4, 8, and 15 all reserving the right for SBCYahoo! to change service terms or conditions, "SBC Yahoo! reserve the right to modify or discontinue, temporarily or permanently, at any time and from time to time, the Service (or any function or feature of the Service or any part thereof) with or without notice."

unfavorable new terms are also all too prevalent. On the other hand, notifications and bill credits for service outages, extremely slow service, or speeds far less than advertised and paid for by the consumers are far from common practice in the industry, unlike telecommunications services.

Broadband providers are also notoriously slow to fix service problems, especially if it requires a visit to a customer premises. Even that assumes the broadband provider is willing to admit the problem originates within their system. All too common is protracted finger pointing at other vendors, software or hardware involved in the provision of service. Meanwhile, the consumer has an unfixed problem plus the added frustration of not knowing what, if any, state or federal agency has the power to demand redress over these new technologies. Many of these same problems have been addressed by this Commission and state agencies regarding telecommunications services over the past several decades. The Commission should learn from consumers' previous misfortunes and proactively regulate the billing practices of broadband providers, especially as consumers rely on broadband services for time-sensitive, mission-critical, day-to-day services such as local voice service.

Accordingly, in order to ensure consumer protection in the broadband era, the Commission should adopt strong anti-cramming and deceptive advertising rules for broadband that go beyond the Commission's current Truth-in-Billing rules.[92] Chief among them should be a direct general prohibition on the placement of unauthorized charges on broadband bills and a direct general prohibition on fraudulent and deceptive marketing practices in all of their many forms. The Commission should also directly prohibit contracts of adhesion and unconscionable contracting practices of the type described in the preceding paragraphs.

---

[92] While NASCUA does not intend to propose specific rules at this time, state law on this matter may serve as a useful example. *See e.g.,* California Public Utilities Code §2890 ("A telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized." In addition to the general prohibition on unauthorized charges, the California statute includes several safeguards and affirmative requirements to ensure bills are clear and deceptive marketing is avoided.).

The Commission should accompany these new rules, moreover, with a full commitment to swift and vigorous enforcement action when violations are credibly alleged. There are several essential components to such a commitment.

The first is human resources, in the form of investigation and law enforcement personnel. In an increasingly complex electronic environment, complaints do not always resolve with ease. Too often, it is tempting for busy enforcement personnel to close files upon the alleged infractor's agreement to credit or refund the disputed billing. Such perfunctory resolutions are inconclusive. In the long-run, they disserve the public interest by leaving possible frauds and abuses uninvestigated and unchecked. The frauds and abuses consequently persist, to the public's detriment.

The second component is adequate remedies. Refunds or credits of moneys unlawfully billed accomplish no more than requiring a bank robber once caught to return stolen money. The most promising means for curtailing and eliminating fraud and abuse is the civil monetary penalty. The Commission should support its availability and use.[93]

Third, as the Commission concluded in the context of slamming, experience demonstrates the vital importance of foreclosing potential sources of fraud before they become a major subject of consumer complaints.[94] The Commission should accordingly be prepared to not only analyze and resolve consumer complaints, but also to take swift and vigorous enforcement

---

[93] The Commission has the legal authority to ensure strict penalties can apply. Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 174, 185-08 (2000) ("The Court of Appeals . . . misperceived the remedial potential of civil penalties"). Further, if patterns of fraudulent practice involving specific carriers begin to appear, the Commission should not hesitate to exercise its authority to refer complaints for criminal prosecution. 47 U.S.C. §501 (allows for monetary penalties or imprisonment for anyone who willfully and knowingly commits an unlawful act).

[94] Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Fifth Order on Reconsideration, 19 F.C.C.R. 22, 926 at ¶ 14 (2004).

action when indications of fraud and abuse first appear, without awaiting the accumulation of a large number of complaints against a particular allegedly infracting company.

Fourth, the Commission should create a separate category of complaints specifically for broadband access providers, further broken down by technology platform (*i.e*. wireless, wireline, cable, satellite, *etc*.). As discussed below, in Section III.H.4., *infra,* this complaint category should be included in the quarterly complaint and inquiry report issued by the Consumer and Governmental Affairs Bureau and should be made available on line as soon as possible following the quarter's end. That Bureau's annual report should include for each technology platform: the number of complaints, the nature of the complaints and the year's trends as to which patterns were increasing and which patterns were decreasing. Such tracking will give Congress, the Commission and the states the information they need to analyze and address problems as they arise. In addition, by providing complaint statistics on broadband access providers to consumers, the Commission will be giving consumer needed tools to assess the marketplace and make competition work to their advantage.

F. Network Outage Reporting Is A Vital Consumer Protection In The Broadband Era To Ensure That Consumers Have Reliable Access To The Broadband Network.

1. Introduction.

In the NPRM, the Commission specifically seeks comments on whether it should exercise its Title I authority to impose network outage reporting requirements on broadband Internet access service providers.[95] The Commission notes that it requires certain communications providers to notify the Commission of outages of thirty or more minutes that

[95] NPRM at ¶ 154.

affect a substantial number of customers.[96] The Commission further seeks comment on whether the purposes of current network outage reporting requirements apply to outages of broadband Internet access service and whether requirements should be adopted that differ depending on the nature of the facility or type of customer served.[97] NASUCA submits that network outage reporting is a vital consumer protection in the broadband era and the Commission should take steps to ensure that consumers have reliable access to the broadband network.

2. The Commission Should Exercise Its Title I Authority To Impose Reporting Requirements On Broadband Internet Access Service Providers.

The Commission should in fact exercise its ancillary jurisdiction to apply network outage reporting requirements to *any and all* forms of two-way communications widely used by consumers, including broadband Internet access service. The basis for Title I authority, set forth solidly in the NPRM,[98] is a practical, legal and logical extension of that same authority exercised in the Commission's determination in the Outage Order.[99] Relying on ancillary authority described in the Outage Order, network outage reporting requirements were revised effective January 3, 2005, and the scope of those obligated to file reports was expanded to include all providers of voice and/or paging communications.[100] The Commission should take the same approach in this proceeding.

---

[96] Id.

[97] Id.

[98] Id. at ¶¶ 108-110.

[99] In the Matter of New Part 4 of the Commission's Rules Concerning Disruptions to Communications, ET Docket No. 04-35, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 16830 (rel. Aug. 19, 2004) ("Outage Order").

[100] Id. at ¶¶ 1 and 12.

3. The Purposes Of Commission Network Reporting Requirements Apply To Outages Of Broadband Internet Access Service.

Just as with the information currently reported by providers of voice and/or paging communications, the Commission must secure that same information from broadband Internet access service providers because of the "critical need for rapid, complete and accurate information on service disruptions that could affect homeland security, public health or safety, and the economic well-being of our Nation..." as described in the Outage Order.[101] Increasing numbers of consumers rely upon broadband not only in their workplace and homes, but as citizens who use broadband to access public libraries, interact on line with local government to renew drivers' licenses and a myriad of other functions. Even more than with "Plain Old Telephone Service", consumers of broadband are spending large amounts of money for transmissions in which service disruptions mean loss of data, not just voice.

The Commission should reject arguments by broadband Internet access service providers who claim that an exemption from reporting requirements is justified because of one or more technological distinctions from the voice and/or paging communications subject to current reporting requirements. Although such distinctions may be significant to the manner in which a particular provider chooses to market a service or develop its business plan, they are not relevant to reporting the *disruptions* of such service.

Instead, the standard of reasonable consumer expectation should dictate how the Commission fulfills its obligations to ensure consumer protection. Consumers, especially residential consumers represented by NASUCA members, care little about the terminology such as "Internet access" or the technology specifics they count on to deliver these transmissions.

[101] Id. at ¶ 1.

Consumers expect that reasonable design and maintenance measures will be used to protect against preventable disruptions of service.

Recent history should fortify the Commission against anticipated outcries that such reporting requirements would be an intolerable and an enormously expensive burden on providers of broadband Internet access service. Such claims preceded the effective date of the currently revised reporting requirements. For example, various providers insisted they simply could not comply with the reporting requirements associated with DS3[102] outages without spending vast millions of dollars to significantly retool their internal information-gathering practices. Yet DS3 is the workhorse of the industry, regardless of the "type of customer served." Keeping track of the DS3-related information sought in the Outage Order of 2004 is inseparable from principles of prudent management and preventive maintenance.

Despite legal challenges to the new rules, industry cries subsided once the effective date arrived and providers had the chance to actually use the new streamlined electronic filing procedure designed by the Commission.[103] Exaggerated or unfounded negative perceptions of the new reporting system were largely eliminated. It was a tribute to the Commission staff and industry representatives that, in relatively short order, they were able to clarify how to make the new reporting system work while at the same time improving their own internal troubleshooting practices, all to the benefit of consumers.

This recent history of industry resistance followed by acceptance with the relatively new network reporting requirements provides a solid precedent for the Commission to stay the

---

[102] DS3 is Digital Signal, level 3. In North America, a DS3 generally is equivalent to 28 channels each operating at a total signaling rate of 1.544 megabits per second. *See*, Newton's Telecom Dictionary, 20th Edition, at 273.

[103] The Commission hosted a series of pre- and post-effective date working sessions for those employed by providers at the front lines of reporting. These informal sessions provided a practical and useful way for industry representatives to see how the new system would deal with a wide range of hypothetical situations. As a result, misunderstandings were cleared up and minor bugs in the process corrected.

course, and adopt reporting requirements for broadband. And, because a given DS3, for example, might be carrying both Internet and non-Internet related traffic, the burden of extending current reporting requirements to providers of broadband Internet access service should be *de minimis*. The outage reports the Commission is already receiving from most providers of voice and/or paging communications are identical to that which they would report as a broadband Internet access service provide. In this way, these requirements would create no additional burden to such providers.

In effect, expanding those requirements to "broadband Internet access services providers" will have an impact only on those that exclusively provide broadband Internet access service. These are the providers that have until now escaped the new reporting requirements only because of a definition that failed to capture them. That gap in the definition unfairly deprives consumers of the protection they deserve. In the face of anticipated resistance to the determination that current network outage reporting requirements must apply to broadband Internet access service providers, NASUCA urges the Commission to overcome such resistance by again working in common sense fashion with these carriers.

The role of the Commission in collecting and analyzing outage reporting data is all the more important because consumers have neither the protection of mandatory federal service quality standards nor publicly available outage reports filed with the Commission. Those reports are protected as confidential as of January 2005, as is expected to be the case for any reporting required of broadband Internet access service providers. As a result, consumers are deprived of information that otherwise could serve to assist them in making intelligent marketplace decisions. When deciding which service to purchase from which provider and at what price,

consumers cannot access outage reports that could shed light on providers' service disruption track records.

That is why the Commission assumed a higher responsibility beginning in January 2005 to do more than merely *collect* network outage reporting data as it had previously. In *analyzing* current reporting data (and hopefully the expanded population of providers identified in this NPRM) the Commission has the responsibility to use its influence to push for industry standards that would correct design, maintenance or repair policies that cause or contribute significantly to such disruptions.

Additionally there is the serious and inseparable duty to frequently report to Congress and the public on that outage data analysis consistent with the confidentiality protections deemed by the Commission to be important to national security. For example, in the absence of voluntary corrective action by industry, the report should specify what further statutory and/or regulatory steps are necessary to reasonably protect consumers against preventable disruptions. Similarly, the Commission should draw on its Office of Strategic Planning and Policy Analysis to identify patterns of preventable disruptions and root causes that reflect market failures. In doing so, options should be identified to correct such market flaws consistent with the goal of encouraging a vigorously competitive marketplace that would ultimately be the consumers' best protection against service disruptions.

4. The Commission Should Not Adopt Requirements That Differ Depending On The Nature Of The Facility Or The Type Of Customer Served Because Such Requirements Would Be Neither Helpful Nor Relevant**.**

As indicated above, most carriers already report information relevant to broadband Internet access service disruptions. DS3 capacity travels on fiber or radio and carries circuit and/or packet data. There is no distinction made as to whether the packets are traveling to or

from the Internet or are used for some other purpose, including VoIP. The "nature of the facility" thus is irrelevant for purposes of outage reporting. That phrase in fact appears to serve no purpose here other than to create a loophole. Specifically, it would provide an incentive for providers to manipulate and distort representations about the "nature" of the facility in order to justify their refusal to report various outages. The Commission should keep it simple: The most practical and low cost compliance would be achieved by merely folding providers of broadband Internet access service into the current reporting regime.

G. The Commission Should Maximize The Use Of Both Federal And State Law And Encourage Cooperation And Resources To Address Fraud, Abuse And Other Consumer Problems In The Broadband Era.

As discussed above regarding cramming, fraud and abuse, *see*, Section III.E., *supra*, NASUCA supports active Commission involvement in preventing fraud and abuse in broadband. NASUCA also supports the Commission's acknowledgment of the important role played by the states in ensuring that consumer protection goals are met.[104] The Commission seeks comment on how best to harmonize federal regulations with the states' efforts and expertise in these areas.[105] NASUCA responds that the correct approach to fraud, abuse and other consumer problems is to maximize the use of both federal and state law, to encourage the commitment of needed resources at both federal and state levels, and to encourage maximum cooperation between federal and state authorities. Preemption of state industry-specific consumer protection laws is not sound public policy.

In the context of slamming, the Commission has recognized that state public utility commissions are particularly well-equipped to address consumer complaints:

---

[104] NPRM at ¶ 158.

[105] Id.

> We agree with NARUC that the states are particularly well-equipped to handle complaints because they are close to consumers and familiar with carrier trends in their region. As NARUC describes, establishing the state commissions as the primary administrators of slamming liability issues will ensure that "customers have realistic access to the full panoply of relief available under both state and federal law . . . ." [T]he General Accounting Office (GAO) has reported that all state commissions have procedures in place for handling slamming complaints, and that those procedures have been effective in resolving such complaints.[106]

This approach is well-grounded in law and public policy. The Commission should follow it in combating fraud and abuse in broadband.

The alternative suggestion that the states should be stripped of authority to enact and enforce industry-specific consumer protection laws for broadband services[107] is contrary to the foregoing learning and lacking in legal support. Even the NPRM's suggestion that the states be limited to enforcing federal rules is an unacceptable limit to a state's power to protect its consumers.[108] It would chill the states' consideration of industry-specific consumer protection measures that would otherwise apply to broadband services. It would effectively force the states to use a sledge hammer in place of a scalpel, *i.e*., to enact broad "general" laws to address

---

[106] Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 (first order on reconsideration), 15 F.C.C.R. 8158 ¶ 25 (2000). From 1996 to 1998, state public utilities commissions and state attorneys general ordered companies to pay at least $13.4 million in customer restitution and at least $14.1 million in penalties and fines for slamming and cramming violations. These completed enforcement actions affected at least 397,765 consumers. These totals, however, understate the actual outcomes of these actions because the state public utilities commissions and attorneys general did not always include in their survey responses the number of consumers affected or the amount of customer restitution and penalties involved. General Accounting Office, Telecommunications: State and Federal Actions to Curb Slamming and Cramming, Report to the Chairman, Permanent Subcommittee on Investigations, Committee on Governmental Affairs, United States Senate (July 1999), pp. 14-15. In most states, slamming disputes are resolved by the state public utility commission. Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, *supra*, 15 F.C.C.R. 8158 ¶ 24, n. 64.

[107] *See*, Truth-in-Billing Second Report and Order, at ¶¶ 2, 53 (2005) (emphasis added).

[108] NPRM at ¶ 158.

problems that may be unique to the broadband industry. Few state legislatures will be inclined to enact such general laws to combat specific abuses.

The practical effect of blanket preemption of industry-specific state consumer protection laws would be to leave all industry-specific consumer protection solely in the hands of federal officials. As in the slamming context, these officials are often far removed, geographically and otherwise, from the victims on whom the deleterious effects of the abuses are visited. They often lack the resources to do justice to the vast majority of the complaints. The remedies available to them may be less effective in halting the abuses than those the states may be able to craft.[109] For each of these reasons, the consumer protection that federal officials can provide is alone insufficient.

The slamming regulations again provide a framework well-grounded in law and policy for consideration of preemption issues:

> [T]he Commission will not make a preemption determination in the absence of an adequate record clearly describing the state law or action to be preempted and precisely how that state law or action conflicts with federal law or obstructs federal objectives. The record in this proceeding does not contain any comprehensive identification or analysis of which particular state laws would be inconsistent with our verification rules or would obstruct federal objectives . . . . [C]ommenters merely allege generally that carriers will find it easier to comply with one uniform set of federal rules rather than with federal rules and multiple sets of state rules. Accordingly, the record does not contain sufficient information about various state requirements to allow us to assess the ability of carriers to comply with both federal and state anti-slamming mechanisms.[110]

---

[109] *See*, In re Canales Complaint, 637 N.W.2d 236, 245 (Mich. App. 2001) ("The [Michigan Public Service Commission] found that without heavy fines there would be insufficient incentive for . . . providers to stop slamming because they would simply reimburse those customers who complain of the switch, but continue to collect fees from the other slammed customers").

[110] Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 (second report and order and further notice of proposed rulemaking), 14 F.C.C.R. 1508 ¶ 89 (1998); *see also*, Communications Telesystems Intern. v. California Public Utility Comm'n, 196 F.3d 1011, 1017 (9th Cir. 1999)

Service quality standards are another area where state involvement has historically been very important. The Commission should not preclude states from adopting service quality and other consumer protection standards for broadband service providers as they deem necessary. The Commission should recognize that some uses of broadband services may require compliance with various state standards. Preempting states from addressing service quality issues would be bad public policy because service quality can be affected by so many "local" factors such as weather and topography. States should be able to establish and enforce the necessary consumer protections, including service quality standards in those instances. This is true particularly as more voice traffic is being carried over the broadband network.

Such a framework respects, as the Commission does again in the current NPRM, the important role played by the states in ensuring consumer protection. Although some state laws or proposed state laws might indeed obstruct federal objectives, that is insufficient grounds for preemption. The Commission has ample ability to meet challenges of that type without seeking to institute a blanket preemption at the outset.[111] By eschewing such a blanket preemption, and enlisting the states in a cooperative effort to prevent and combat the fraud and abuse through the enforcement of both federal and state industry-specific consumer protection statutes, the Commission can best ensure that broadband is adequately policed and the goals of the Act met.

Examples of concurrent federal and state laws prohibiting identical criminal acts abound. Federal and state laws prohibiting the manufacture and sale of illicit drugs is one example. Yet Congress has not preempted states from enacting their own laws prohibiting this conduct.

("The Act was designed . . . to protect competition in the industry while allowing states to regulate to protect consumers against unfair business practices such as slamming . . . .").

[111] For example, in Time Warner Entertainment Co., L.P. v. F.C.C., 56 F.3d 151, 194 n. 17 (D.C. Cir. 1995), the court observed that the Commission might at times avail itself of the opportunity to file an amicus curiae brief in state enforcement proceedings, as a means of informing the state of the Commission's position on whether enforcement of a particular state consumer protection law would offend federal preemption policy.

Rather, local, state and federal prosecutors informally divide their responsibilities for prosecution of an act that might violate both laws in order to stretch all of their scarce resources. Each level of government has the common goal of preventing illicit drugs. Likewise, the states and the FCC have the common goal of preventing consumer frauds in the telecommunications industry. The overarching objective is identical.

H. It Is A Vital Consumer Protection In The Broadband Era For Consumers To Be Able To File Complaints Against Their Broadband Service Providers And For Such Complaints To Be Tracked In A Consolidated Manner.

1. Introduction.

It is vital that the FCC be responsive to consumer complaints, both formal and informal.[112] That responsiveness must be in place for wireline, broadband or any new technology. Currently, from the outset of a consumer contact, FCC intake staff makes a determination of whether to designate the communication a "complaint" or merely an "inquiry." That distinction in turn becomes relevant to the respective tracking, reporting and handling of each consumer contact. Training of those who make that initial determination, as well as written guidelines used in applying the complaint/inquiry distinction should be drafted so as to reasonably ensure those labels are consistently and logically applied. If not, public policy that is intended to protect consumers against reasonably preventable problems, let alone abusive practices, is seriously undermined.

The danger to be protected against is a system so arbitrary in how those terms are defined and applied that those operating or overseeing the system may mask, deliberately or

[112] For purposes of this discussion, references to complaints include both formal and informal complaints.

inadvertently, consumer dissatisfaction by unfairly designating as "inquiries" what in fact are high numbers of what the average person would readily understand to be a "complaint."

Another key component of appropriate complaint handling is to do more than simply forward those complaints to providers and assume that, in the absence of a follow-up complaint for the same problem by the complainant, the initial complaint has been "resolved" to the consumer's "satisfaction." As a practical reality, many if not most consumers are unlikely to take the time and trouble to file a repeat or supplemental complaint. That is largely because their initial experience with such a passive process leads to lost confidence in any system that they understandably conclude has not been helpful the first time around.

Decades ago, regulation were enacted so that automobile manufacturers were not allowed to use that same approach in an effort to avoid consumer protections against "Lemon" vehicles. The passive approach likewise does not appear consistent with those used by other federal regulatory agencies. Consider the process used by the Department of Transportation ("DOT") and its Aviation Consumer Protection Division ("ACPD"):

> The ACPD operates a complaint handling system for consumers who experience air travel service problems….All complaints are entered in DOT's computerized aviation industry monitoring system, and are charged to the company in question in the monthly Air Travel Consumer Report. This report is distributed to the industry and made available to the news media and the general public so that consumers and air travel companies can compare the complaint records of individual airlines and tour operators. These complaints are reviewed to determine the extent to which carriers are in compliance with federal aviation consumer protection regulations. This system also serves as a basis for rulemaking, legislation and research. The Department of Transportation produces an annual Report to Congress summarizing complaints that air carriers receive about disability-related issues. The ACPD

> publishes a number of booklets and fact sheets on air travel consumer protection issues.[113]

Also consider that although the Federal Trade Commission does not resolve individual complaints, it uses the data collected in a less passive way toward investigation and follow up.[114] Similarly, other agencies that, like the FCC, have responsibility related to public health and safety, also appear to take a more proactive approach than the FCC including the Food and Drug Administration, the Consumer Product Safety Commission and the National Highway Transportation Safety Administration.[115]

The FCC will promote competition and supplier diversity by bolstering consumer confidence in the effectiveness of its complaint resolution procedures. Not all consumer grievances require government intervention. Yet consumer access to prompt complaint resolution procedures that are easy to access, understand and use and are effective, will serve to encourage broadband service providers to respond promptly and effectively to consumer concerns of their own accord. Consumers of broadband service providers should be able to rely on a Commission process that allows them to effectively track and read reported complaints so that, as consumers, they may be aware of a broadband service providers' "track record" as they shop for their broadband service.

In its reporting function, the Commission should do more than merely include complaints received with respect to wireline, broadband, and other new technologies. First, it should do so in a format that allows the reader to review that information on a technology-by-technology basis. Second, the format should facilitate the ability of regulators, legislators, the media and the public to understand both the nature and frequency of complaints received per technology.

---

[113] *See,* http://airconsumer.ost.dot.gov/problems.htm.

[114] *See e.g.*, https://rn.ftc.gov/pls/dod/wsolcq$.startup?Z_ORG_CODE=PU01.

[115] *See e.g.* ,http://www.fda.gov/opacom/backgrounders/report.html.

Third, in its periodic and annual reports, the Commission and its Office of Consumer and Governmental Affairs and Enforcement Bureaus should also identify, quantify and track patterns of problems including the degree to which those patterns have increased or decreased since the last report. That data is an essential component of the assessment of whether marketplace forces are adequately protecting consumers, and if not, where corrective action is most needed.

2. The Commission's Complaint Processes Must Be Easily Accessible For Consumers.

The Commission specifically mentions consumer options for enforcement in the NPRM.[116] The Commission notes the various methods of pursuing complaints with the Commission against entities subject to the Commission's jurisdiction, including the existing Commission complaint process established pursuant to Section 208 of the Act and the Commission's regulations.[117] However, there are additional assurances that the Commission must apply to broadband service providers that are vital consumer protections in the broadband era. Those protections include:

- Consumers should have easy access to appropriate broadband service providers' personnel so that consumers may attempt to resolve a complaint before approaching the FCC, but should not be required to approach a broadband service provider before filing a complaint with the FCC;

- the Commission should effectively track and report complaints filed against individual broadband service providers;

- the Commission should assist in the serving of complaints on the subjects of those complaints;

- the form and content of complaints should be as expansive as possible and should not inhibit the filing of complaints;

---

[116] NPRM at ¶ 159.

[117] Id.; *see also*, In the Matter of Establishment of Rules Governing Procedures to be Followed When Informal Complaints Are Filed by Consumers Against Entities Regulated by the Commission, CI Docket No. 02-32 ("Complaint NPRM"). *See also*, 47 U.S.C. § 208; 47 C.F.R. §§ 1.1711-1.736.

- Companies should be required to resolve a complaint within thirty (30) days after receipt;

- the FCC should, where possible, coordinate its complaint process with those used by the states so that Federal and State regulators may quickly resolve and accurately monitor complaints;

- the general content of consumer complaints should be made public and be reported to the necessary regulatory bodies while still respecting the confidentiality of the specifics of individual complainants' issues; and

- complaints should be given exempt *ex parte* status to aid expeditious resolution so long as all parties receive fair and equal treatment.[118]

A complaint procedure with these elements is vital to protect consumer interests and to preserve consumer confidence in the broadband era.

Consumers should have easy access to the FCC's formal and informal complaint process and consumers should not be required to approach a broadband service provider before filing a complaint with the FCC. The FCC has previously encouraged consumers to voice grievances directly to the responsible entity,[119] and NASUCA generally encourages consumers, where appropriate, to informally express concerns or grievances about products and services directly to the provider before filing a complaint with the FCC. However, consumers should ***not*** be required to attempt to resolve a dispute on their own before contacting the FCC for assistance. Any such procedural hurdles would be against the public interest. It may be difficult for consumers to contact the broadband service provider against whom they have a grievance. Therefore, the avenues through which a consumer may choose to remedy a grievance, whether through self-help or a complaint, should remain the choice of the consumer. The FCC should not

---

[118] For a more detailed discussion of these issues, please see NASUCA Comments dated May 16, 2002 filed in the Complaint NPRM proceeding.

[119] Complaint NPRM at ¶ 5.

establish a hierarchy of administrative remedies through which consumers must pass to obtain relief. No complaint should ever be dismissed because a consumer failed to first contact the entity that may be the cause of the problem.

3. Key Rules Are Necessary To Ensure Effective Consumer Complaint Handling.

The FCC should establish rules to assist consumers in the resolution of complaints against broadband service providers as a vital consumer protection in the broadband era. For example, when a consumer attempts to resolve the dispute directly with his or her provider, then that provider should make it easy to determine who to contact if the resolution is unsatisfactory. The FCC should require that all broadband service providers provide this complaint contact data directly to the consumers and to the FCC. The FCC should then also make that information available to the public via the FCC website, and the FCC should also enter that data into its computer system so that the person calling the FCC may obtain the appropriate contact information for any broadband service provider. In addition, a single point of contact should be conspicuously designated for both consumers and the FCC within the public materials provided by that entity. The conspicuous notice would include placing that contact information within billing statements, websites, and other promotional materials. Consumers should have easy access to the representatives of broadband service providers not only for the purpose of the complaint process, but also in the normal course of business as well.

The FCC also should require broadband service providers to provide it with: 1) corporate names and addresses, 2) "dba" (*i.e.*, doing business as) names used in marketing consumer products and services, 3) relevant telephone numbers, 4) relevant website addresses, 5) customer service locations and 6) names of complaint contact sources. This information will help both the

FCC and the consumer expeditiously process complaints. The FCC should assist in serving complaints on the subjects of those complaints.

The form and content of consumer complaints should be as expansive and flexible as possible and should not inhibit the filing of complaints. No elements of the complaint should be mandatory such that exclusion of a single element would invalidate the complaint. The FCC has recognized that rigid complaint criteria will necessitate diligence on the part of consumers in preparing and submitting complaints.[120] Rigid criteria may be appropriate in certain circumstances, such as filing one's taxes, but must not be too burdensome in the context of the resolution of other complaints. For example, hard copies of bills or other correspondence do not easily accommodate telephonic or electronic complaint submission.

The FCC should not dismiss a complaint unless, upon inquiry by FCC staff, the complainant cannot allege facts sufficient to support the complaint. Additionally, complaints should not be dismissed if they are not in writing because, as the FCC noted in the NPRM, there are numerous ways a consumer can file a complaint, many of which do not entail filing a written complaint.[121]

Finally, broadband service providers should be required to provide a resolution to a complaint within thirty days (30) after receipt with allowances for only moderate extensions beyond that period when clearly justifiable. Quick responses to consumer complaints are a vital consumer protection in the broadband era, particularly as some may involve ongoing monthly charges that could continue until the resolution of the complaint.

---

[120] Id. at ¶ 12.

[121] NPRM at ¶ 159.

4. Complaint Tracking And Public Access To The Data Is Vital Information For The Marketplace.

The FCC should track complaints against broadband service providers, with the data regarding technology platforms as disaggregated as possible. Excessive numbers of complaints, even those that consumers may resolve through self-help, may be symptomatic of larger issues of which the FCC, state commissions, NASUCA members and state attorneys general should be aware. It would also be a valuable tool if state commissions and NASUCA members could access an aggregated complaint database similar to the FCC's ARMIS data. There, consumers, as well as other interested parties, could track complaints and compare the performance of each of the broadband service providers. Such data would prove invaluable in assisting consumers in choosing a broadband service provider. In fact, uniformly compiled complaint data is often extremely difficult to obtain, yet it is one of the most effective tools with which consumers may focus their attention.

The Commission should encourage better sharing of information between it and state agencies. General matters contained within the complaint should be reported to the necessary regulatory bodies. State agencies and other affected parties, including NASUCA members, state commissions and state attorneys general, should have access to the general information contained within informal complaints while still maintaining the confidential treatment of protected information. Confidential treatment of certain information in the complaint should not prevent the accurate public reporting of the complaints in aggregate form, or protect the disclosure of non-identifying facts. However, this sharing of information should not be allowed to delay or undermine complaint resolution as a result of complaints "lost in the shuffle" between various government agencies. The agency with appropriate jurisdiction should resolve the consumer complaint as expeditiously as possible and share the results as described above.

IV. CONCLUSION

WHEREFORE, the National Association of State Utility Consumer Advocates respectfully requests that the Federal Communications Commission consider these Comments in this proceeding. NASUCA applauds the FCC's commitments to adopt non-economic regulations that are necessary to ensure consumer protection in the broadband era and the use of swift and vigorous enforcement action when necessary. Such consumer protections include those articulated by the FCC in the Notice of Proposed of Rulemaking as well the additional issues of open access and universal service which NASUCA raises above.

Respectfully submitted,

_____

National Association of State Utility Consumer Advocates
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone: (301) 589-6313

Kathleen F. O'Reilly
Attorney at Law and Counsel to NASUCA
414 "A" Street, Southeast
Washington, D.C. 20003
Phone: (202) 543-5068

David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications Committee
Karen Hardie, Principal Regulatory Analyst Office
Ohio Consumers' Counsel
10 West Broad St., Suite 1800
Columbus, Ohio 43215
Phone: (614) 466-8574

Philip F. McClelland
Senior Assistant Consumer Advocate
Joel H. Cheskis
Assistant Consumer Advocate
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101
Phone: (717) 783-5048

Christine A. Mailloux
Telecommunications Attorney
The Utility Reform Network
711 Van Ness Avenue, Suite 350
San Francisco, CA 94102
Phone: (415) 929-8876, ext 353

John R. Perkins, Consumer Advocate
Craig F. Graziano
Office of Consumer Advocate
Iowa Department of Justice
310 Maple Street
Des Moines, IA 50319-0063
Phone: (515) 281-5984

January 17, 2006
86784